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Supreme Court, U.S.
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No. 07-

IN THE

Supreme Court of the United States

JANE H. CHUN, *et al.*,

Petitioners,

v.

STATE OF NEW JERSEY,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE NEW JERSEY SUPREME COURT

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Is an individual's Sixth Amendment right to confront witnesses against him violated where the State is permitted to rely on documents created for the sole purpose of supporting computer-generated evidence used to convict the individual, without requiring the proponent of the document to testify?

LIST OF PARTIES

Petitioners:

JANE H. CHUN; JAMES R. HAUSLER; JEFFREY R. WOOD; ANTHONY ANZANO; RAJ DESAI; PETER LIEBERWIRTH; JEFFREY LING; HUSSAIN NAWAZ; FREDERICK OGBUTOR; PETER PIASECKI; LARA SLATER; CHRISTOPHER SALKOWITZ; ELINA TIRADO; DAVID WALKER; DAVID WHITMAN; JAIRO J. YATACO

Respondent:

STATE OF NEW JERSEY

Intervenor:

DRAEGER SAFETY DIAGNOSTICS, INC.

TABLE OF CONTENTS

	Page
QUESTION PRESENTED	i
LIST OF PARTIES	ii
TABLE OF CONTENTS	iii
TABLE OF APPENDICES	v
TABLE OF CITED AUTHORITIES	vi
OPINIONS BELOW	1
STATEMENT OF JURISDICTION	1
CONSTITUTIONAL PROVISION INVOLVED	2
STATEMENT OF THE CASE	2
Procedural History	2
The New Jersey Supreme Court's Determinations	3

Contents

	Page
REASONS FOR GRANTING THE PETITION ..	9
I. REVIEW IS WARRANTED TO CORRECT THE MISAPPLICATION OF THE SIXTH AMENDMENT AND HEARSAY EXCEPTIONS BY THE NEW JERSEY SUPREME COURT, ALLOWING ADMISSION OF DOCUMENTS WITHOUT SUPPORTING TESTIMONY TO CONVICT DEFENDANTS	9
II. THIS PETITION SHOULD BE GRANTED BECAUSE THE DECISION FROM NEW JERSEY'S HIGHEST COURT IS FINAL AS TO THE NAMED DEFENDANTS AND THOUSANDS OF AFFECTED PARTIES WHOSE CASES REMAIN PENDING TRIAL	20
CONCLUSION	21

TABLE OF APPENDICES

Page

Appendix A — Opinion Of The Supreme Court Of New Jersey Filed March 17, 2008 ..... 1a

Appendix B — Order Of The Supreme Court Of New Jersey Dated March 17, 2008 ..... 128a

Appendix C — Supplemental Findings And Conclusions Of Remand Court Dated November 8, 2007 ..... 141a

Appendix D — Findings And Conclusions Of Remand Court Dated February 13, 2007 .... 240a

TABLE OF CITED AUTHORITIES

Page

Cases:

Barber v. Page, 390 U.S. 719 (1968) 12

California v. Trombetta, 467 U.S. 479 (1984) .. 9, 10

Crane v. Kentucky, 476 U.S. 683 (1986) 10

Crawford v. Washington, 541 U.S. 36 (2004) ... *passim*

Davis v. Alaska, 415 U.S. 308 (1974) 9

Davis v. Washington, 547 U.S. 813 (2006) 6, 11

Doe v. United States, 487 U.S. 201 (1988) 11

Hiibel v. Sixth Judicial Dist. Court of Nevada, Humboldt County, 542 U.S. 177 (2004) 11

Ohio v. Roberts, 448 U.S. 56 (1980) 10

Palmer v. Hoffman, 318 U.S. 109 (1943) 14

Pointer v. Texas, 380 U.S. 400 (1965) 9, 10

State v. Chun, 194 N.J. 54 (2008) 1, 3

Cited Authorities

Page

Constitutional Provision & Statutory Citations:

Sixth Amendment to the United States Constitution ..... *passim*

28 U.S.C. § 1257(a) 1

N.J.S.A. 39:4-50 20

Petitioners respectfully petition for a Writ of Certiorari to the Supreme Court of New Jersey in *State v. Chun*, 194 N.J. 54 (2008).

OPINIONS BELOW

The opinion of the New Jersey Supreme Court is reported at *State v. Chun*, 194 N.J. 54 (2008). *See* Appendices A-B. The opinion adopts, as modified, the unpublished Reports of the Special Master. *See* Appendices C-D.

STATEMENT OF JURISDICTION

This Court's jurisdiction is invoked under 28 U.S.C. § 1257(a).

The New Jersey Supreme Court's decision in this matter, entered on March 17, 2008, is final as to the scientific reliability and the foundational prerequisites to establish operability of a newly adopted breath testing machine, the Draeger Alcotest® 7110 MKIII-C. While each individual matter was remanded to the lower courts for separate disposition based on the determinations set forth in the challenged opinion, the question at issue were decided to conclusion by the highest court of the State of New Jersey. This decision by the New Jersey Supreme Court is repugnant to the United States Constitution, and affects thousands of pending cases similarly situated to the named defendants herein, and is worthy of review by this Court.

CONSTITUTIONAL PROVISION INVOLVED

Sixth Amendment to the United States Constitution:

> In all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him. . . .

STATEMENT OF THE CASE

1. Procedural History

Defendants in this case and similarly situated defendants across the State of New Jersey[1], were and are charged with driving with a prohibited blood alcohol content after being breath tested on the Draeger Alcotest® 7110 MKIII-C, a machine never previously held to be reliable by another court. The parties in this matter are sixteen individuals who were arrested in various municipalities in one county in New Jersey. At the State's request, a lower court consolidated these particular defendants to consider the scientific reliability of the Alcotest. All other cases involving Alcotest results proceeded, pending the result of the reliability hearing. The New Jersey Supreme Court, sua sponte, certified the matter, and remanded the case to a Special Master, who submitted findings and conclusions on two separate occasions. *See* Appendices C and D.

Prior to its opinion and order of March 17, 2008, the New Jersey Supreme Court requested briefs from the parties regarding the application of *Crawford v. Washington*, 541 U.S. 36 (2004) to the foundational documents required to prove a defendant's breath alcohol content.

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1. According to the State, there are approximately 36,000 DWI arrests in New Jersey each year.

2. The New Jersey Supreme Court's Determinations

The New Jersey Supreme Court's decision in *State v. Chun*, 194 N.J. 54 (2008), undermines and is repugnant to the United States Constitution — specifically, the Confrontation Clause of the Sixth Amendment — by admitting into evidence critical information generated by police and the manufacturer for the sole purpose of prosecution, without challenges to reliability in the crucible of cross examination.

The New Jersey Supreme Court's analysis of the general scientific reliability of the Alcotest is grounded, in part, on an expectation that there will be proof that the particular machine that has generated an Alcohol Influence Report being offered into evidence was in good working order, and that the operator of the machine was appropriately qualified to administer the test. This requires that the test results be supported by foundational proofs for admissibility. *See* Appendix A, 105a.

These "foundational documents" that are to be produced during discovery are:

> (1) Calibrating Unit, New Standard Solution Report, most recent change, and the operator's credentials of the officer who performed that change;
>
> (2) Certificate of Analysis 0.10 Percent Solution used in New Solution Report;

(3) Draeger Safety Certificate of Accuracy Alcotest CU34 Simulator;

(4) Draeger Safety Certificate of Accuracy Alcotest 7110 Temperature Probe;

(5) Draeger Safety Certificate of Accuracy Alcotest 7110 Instrument (unless more relevant NJ Calibration Records (including both Parts I and II are offered));

(6) Calibration Check (including both control tests and linearity tests and the credentials of the operator/coordinator who performed the tests);

(7) Certificate of Analysis 0.10 Percent Solution (used in Calibration-Control);

(8) Certificate of Analysis 0.04, 0.08, and 0.16 Percent Solution (used in Calibration-Linearity);

(9) Calibrating Unit, New Standard Solution Report, following Calibration;

(10) Draeger Safety Certificate of Accuracy Alcotest CU34 Simulator for the three simulators used in the 0.04, 0.08, and 0.16 percent solutions when conducting the Calibration-Linearity tests;

(11) Draeger Safety Certificate of Accuracy Alcotest 7110 Temperature Probe used in the Calibration tests; and

> (12) Draeger Safety, Ertco-Hart Digital Temperature Measuring System Report of Calibration, NIST traceability.

See Appendix A, 106-07a.

The Court, citing to *Crawford v. Washington*, 541 U.S. at 56, categorized these foundational documents into three classes:

> (1) those pertaining to the qualifications of the operator;
>
> (2) documents seeking to demonstrate that the machine was in working order at the time of the test, subdividing this category into
>
> > (i) documents directly evidencing the good working order of the machine as of the time of the test, including: the most recent calibration record, the most recent new standard solution report, and the certificate of analysis of the 0.10 simulator solution used in the control tests; and
> >
> > (ii) documents evidencing the accuracy of the devices used and chemical composition of the solutions used to routinely test and calibrate the machine, including the analysis of all of the solutions used to test linearity, the documents attesting to the accuracy of the devices used in the simulator, and the certificates of accuracy of the simulator and temperature probes; and

(3) the AIR being offered into evidence to demonstrate the results of the breath testing.

See Appendix A, 113a.

The Court's second classification of documents — documents demonstrating the working order of the machine — as business records admissible as hearsay without the protections of the Confrontation Clause is error. This classification disregards that (a) many of these documents are generated from functions performed by the police, (b) these documents are created solely for the purpose of prosecution, and (c) these documents are integral in ensuring that the machine is in good working order. *See* Appendix A, 119a.

The Court acknowledged that some of these documents are prepared by the police and the manufacturer, but, citing *Davis v. Washington*, 547 U.S. 813, 821-24 (2006), justified its classification of the documents as non-testimonial by stating that none of them relates to or reports a past fact, and none of them is generated or prepared in order to establish any fact that is an element of the offense.

Further, the Court dismissed the importance of these documents as "too attenuated to require that they be admitted as part of the evidence." *See* Appendix A, 120a. These documents include those relating to the working order of the simulator, the reports of the solutions used during simulation and calibration, the certificate of accuracy of the simulator used to calibrate the device, and the temperature probe documents. The Court's suggestion that any defendant perceiving an irregularity

in any of these documents that might affect the proper operation of the device in question may timely issue a subpoena, disregards the proper placement of the burden of proof for conviction, and disregards the right of citizens to confront evidence against them.

As a result, the foundational documents the Court required to be entered into evidence without witness testimony are: (1) the most recent calibration report prior to a defendant's test, with part I-control tests, part II-linearity tests, and the credentials of the coordinator who performed the calibration; (2) the most recent new standard solution report prior to a defendant's test; and (3) the certificate of analysis of the 0.10 simulator solution used in a defendant's control tests. The calibration and new standard solution reports are included in that class of foundational documents discussed above. That is, they are generated by police for the sole purpose of prosecution and are integral to establishing the existence of an element of the offense.

As to the Alcohol Influence Report itself, the Court concluded that it is also a non-testimonial document that should be admitted without witness testimony, although the operator of the machine will be available to testify as to his general role in the operation of the machine. In a contested matter, the operator must testify as to whether the defendant was observed for twenty minutes prior to the breath testing, that the subject has neither swallowed nor regurgitated any substances during that time that would influence the test results; inputting and verifying the accuracy of the identifying information needed to start the sequence; changing the control

solution if the machine alerts him to do so; attaching a new mouthpiece; reading the instructions about how to blow into the machine; observing the LED screen and following its prompts; and observing the subject to ensure that he or she actually provides a sample. *See* Appendix A, 114a.

Under this rubric, critical Alcohol Influence Report information — like the identification of equipment used, times samples are taken, and the test result itself — is admissible, notwithstanding the operator's testimony. The Court envisioned that, "It may well be that, as the use of the device becomes more routine, some, or even most, defendants will eventually forgo cross-examination of the operator in light of the limited information that can be achieved in that effort." *See* Appendix A, 115a n.44. Thus, the New Jersey Supreme Court expresses the view that confrontation would be unnecessary and should be disregarded for citizens charged with having a prohibited blood alcohol content while operating a motor vehicle.

REASONS FOR GRANTING THE PETITION

I. REVIEW IS WARRANTED TO CORRECT THE MISAPPLICATION OF THE SIXTH AMENDMENT AND HEARSAY EXCEPTIONS BY THE NEW JERSEY SUPREME COURT, ALLOWING ADMISSION OF DOCUMENTS WITHOUT SUPPORTING TESTIMONY TO CONVICT DEFENDANTS

All of the foundational documents were created by the State Police and by Draeger for the sole purpose of litigation. The documents address facts of elemental concern in per se prosecutions, and, as such, are testimonial in nature, rendering the documents, alone, inadmissible without testimony from the declarant of each document. It is axiomatic that defendants must have the ability to cross examine the humans whose written declarations will be used to prove the machine's operability and to obtain convictions in these cases. "[C]ross-examination is the principal means by which the . . . truth [is] tested," *Davis v. Alaska*, 415 U.S. 308, 316 (1974), and "is fundamental and essential to a fair trial in a criminal prosecution." *Pointer v. Texas*, 380 U.S. 400, 403-04 (1965).

A defendant in a DWI prosecution is entitled to vigorously cross examine all aspects of the breath machine. *California v. Trombetta*, 467 U.S. 479, 490 (1984). "[A]s to operator error, the defendant retains the right to cross-examine the law enforcement officer who administered the Intoxilyzer test, and to attempt to raise doubts in the mind of the fact-finder whether the test was properly administered." *Id.*

"Under the Due Process Clause of the Fourteenth Amendment, criminal prosecutions must comport with prevailing notions of fundamental fairness." *Id.* at 485. "Whether rooted directly in the Due Process Clause of the Fourteenth Amendment, or in the Compulsory Process or Confrontation clauses of the Sixth Amendment, the Constitution guarantees criminal defendants 'a meaningful opportunity to present a complete defense.'" *Crane v. Kentucky*, 476 U.S. 683, 690 (1986) (citations omitted) (quoting *Trombetta*, 467 U.S. at 485).

Crawford holds that out-of-court statements by witnesses that are testimonial in nature are barred, under the Confrontation Clause, unless witnesses are unavailable and defendants had prior opportunity to cross-examine witnesses, regardless of whether such statements are deemed generally reliable by the court, abrogating *Ohio v. Roberts*, 448 U.S. 56 (1980). "[T]his bedrock procedural guarantee applies to both federal and state prosecutions." *Crawford*, 541 U.S. at 42, citing *Pointer*, *supra*.

The term "witness" refers to all those who "bear testimony." *Id.* at 51. "'Testimony,' in turn, is typically '[a] solemn declaration or affirmation made for the purpose of establishing or proving some fact.'" *Id.* (citations omitted). It applies both to "in-court testimony" and "out-of-court statements introduced at trial." *Id.* at 50-51. "The constitutional text . . . reflects an especially acute concern with a specific type of out-of-court statement." *Id.* at 51. "[T]his core class of 'testimonial' statements" includes:

> ex parte in-court testimony or its functional equivalent—that is, material such as affidavits, custodial examinations, prior testimony that

> the defendant was unable to cross-examine, or similar pretrial statements that declarants would reasonably expect to be used prosecutorially . . . extrajudicial statements . . . contained in formalized testimonial materials, such as affidavits, depositions, prior testimony, or confessions . . . statements that were made under circumstances which would lead an objective witness reasonably to believe that the statement would be available for use at a later trial. . . .

Id. at 51-52.

"To be testimonial, [a] communication must itself, explicitly or implicitly, relate a factual assertion or disclose information." *Hiibel v. Sixth Judicial Dist. Court of Nevada, Humboldt County*, 542 U.S. 177, 189 (2004) (quoting *Doe v. United States*, 487 U.S. 201, 210 (1988)).

Davis v. Washington, 547 U.S. at 822, defined testimonial statements:

> Statements are nontestimonial when made in the course of police interrogation under circumstances objectively indicating that the primary purpose of the interrogation is to enable police assistance to meet an ongoing emergency. They are testimonial when the circumstances objectively indicate that there is no such ongoing emergency, and that the primary purpose of the interrogation is to

establish or prove past events potentially relevant to later criminal prosecution.

The final test is whether the "evidentiary products" of the communication are of the same character as their "courtroom analogues" so that they "substitute for live testimony." *Id.* at 2277-78. When out of court statements "do precisely what a witness does on direct examination . . . they are inherently testimonial." *Id.* at 2278.

Each of these out-of-court "testimonial statements" are subject to the accused's right to confrontation. *Crawford*, 541 U.S. at 68-69. This requires that they be subject to "testing in the crucible of cross-examination." *Id.* at 61. Accordingly, the Sixth Amendment places an absolute prohibition against the introduction of out-of-court "testimonial statements" made by any witness unless: (1) the witness is unavailable; and (2) the defendant had a prior opportunity to cross-examine the witness. *Id.* at 68. Further, "a witness is not 'unavailable' . . . unless the prosecutorial authorities have made a good-faith effort to obtain his presence at trial." *Barber v. Page*, 390 U.S. 719 (1968).

The foundational documents described by the New Jersey Supreme Court are certifications or statements prepared solely for the purpose of litigation to prove the truth of the matters asserted in the documents. They are not business records. They have no purpose other than to support the Alcotest and the proposition that it was properly operating on the date of the defendant's breath test.

While Alcotest maintenance has been characterized as a "regular business function . . ." that business has one purpose: to convict persons charged with DWI. The particular machine is not used generally in society except for that one purpose. Draeger never sells the machine to anyone but law enforcement, cloaking the machine in secrecy. This is a policy that distinguishes breath testing equipment from virtually all other scientific instruments, like the gas chromatograph or mass spectroscope, which are sold to whomever wishes to purchase one and are used throughout the forensic, academic, and medical communities. Inspection and maintenance procedures are conducted in secret and under the complete direction and supervision of the State. The creator of the document is the proponent of the document. Defendants have no window into the process other than through cross examination.

A laboratory certificate certifying simulator solution ultimately certifies operability of the Alcotest. The State and Draeger rely heavily on the before and after control tests, claiming this to be the bedrock of the Alcotest's reliability. This reliability of the control tests is predicated on the assay of the simulator solution being accurate. To preclude confrontation on this certifying document would prevent examination of one of the most fundamental documents in an Alcotest prosecution.

The State contends that their Alcotest generated calibrations and linearity checks equal proper operation of the machine, and seeks to admit these self-created documents without right of confrontation.

As for documents generated by the machine itself — i.e., the New Standard Solution Reports, Calibration Reports (including control and linearity tests), and the Alcohol Influence Reports, without testimony and cross-examination of the person who tested and calibrated the machine, the certificate becomes the sole proof of the machine's accuracy. It will be accepted as the full proof required for conviction. Trial by this machine without proof of its accuracy holds no place in our system of jurisprudence.

Likewise, Draeger offers various certificates of accuracy for the CU34 simulator, temperature probes, the machine itself, and the Ertco-Hart temperature measuring system to demonstrate that the machine and its many parts (simulator, temperature probe, etc.) are accurate.

These records, made in anticipation of prosecution, are not business records. Business records were defined by *Palmer v. Hoffman*, 318 U.S. 109 (1943), as commercial records with entries made systematically or as a matter of routine to record events or occurrences to reflect transactions with others or to provide internal controls. Business records are records that reflect day to day operation of the business, and are not testimonial since they are not prepared with litigation in mind. In *Palmer*, an accident report was held not to be a business record, because it was prepared in anticipation of litigation.

Crawford intends that business records are still admissible when the primary reason for their creation is not prosecution-oriented — e.g., bank records are

created for banking purposes. Their use at trial is secondary to their primary use, and are likely acceptable under *Crawford.*

The statements made in the "foundational documents" are clearly intended to be used in a quasi-criminal prosecution to prove that the machine is calibrated and in proper working order.

The Confrontation Clause is directed at those who make solemn declarations or affirmations of facts to government officers for the purpose of establishing or proving facts in issue in the case being prosecuted. These documents contain statements only useful prosecutorially, and are made under circumstances which would lead an objective witness to reasonably believe the statements would be available for trial.

These documents are prepared solely for admission at trial. They are crucial to the State's case against an individual, because the admissibility of the breath testing results depends on the machine being in proper working order. There is no other way for the State to prove whether the machine was maintained and in proper working order, but to have these documents admitted at the time of trial or to have a witness testify to the substance of the documents. This requires confrontation of the proponent.

The documents at issue are solemn declarations or affirmations of fact for the purpose of establishing or proving a fact in issue in this quasi-criminal prosecution. The fact in issue is operation of the machine: whether it was set up and configured properly. Each document

certifies to the operability of the machine and testing in some way, thus seeking to remove doubt as to the accuracy of the final result used to convict. The documents thus constitute testimonial evidence.

This is the precise scenario that this Court used to exemplify a Confrontation Clause violation, discussing Sir Walter Raleigh's trial for treason, wherein an alleged co-conspirator's affidavit was read in court as evidence against Raleigh. Raleigh contested the allegations and demanded an opportunity to confront the attestor, face-to-face.

"Leaving the regulation of out-of-court statements to the law of evidence would render the Confrontation Clause powerless to prevent even the most flagrant inquisitorial practices." *Crawford*, 541 U.S. at 51. Allowing the foundational documents into evidence without confrontation, subverts the most basic of constitutional rights and would astound the framers.

These foundational documents were (a) created by the prosecuting authority or the manufacturer, (b) for the sole purpose of establishing operability of the machine, (c) to prove facts leading to a conviction of a per se offense of DWI. When used in an official proceeding to prove, support, establish or evidence some proposition, these documents are proffered to be the equivalent of affidavits, even though unsworn. The documents testify to (1) the accuracy of the evidence, establishing the breath alcohol level, which constitutes an element of the per se offense, and (2) the qualifications of the individual making that determination. In this context, they also testify to their own credibility, both in the methods used to create them and their substantive contents.

Subjecting these facts to the fundamental principles enunciated in *Crawford*, the foundational documents are clearly testimonial in nature. These documents are neither affidavits nor certifications. They are assertions of fact without support. They were "produced with an eye toward trial . . . under circumstances which would lead an objective witness reasonably to believe that the statement would be available for use at trial." *Id.* at 51-52. They are submitted as a "solemn declaration or affirmation made for the purpose of establishing or proving some fact," i.e. the machine was in proper working order on the date in question and that the individual's breath test result was accurate (and hence over the legal limit).

In every way, the documents offered by the State satisfy *Crawford's* definition of "testimonial statements."

Further, these documents are written assertions made out of court and offered at trial to prove the truth of the matter asserted. This characterization is firmly in line with the definition of testimony utilized by the *Crawford* court as an "affirmation made for the purpose of establishing or proving some fact." *Id.* at 51. As such, before it can be admitted, the State is required to establish that the witness who created the document was both unavailable and that the defendant had a prior opportunity to cross-examine the author of the document. If the State fails to meet these requirements, the documents are inadmissible under the Sixth Amendment.

The rule enunciated by the Court in *Crawford* is clear, strict and unambiguous. "Where testimonial statements are at issue, the only indicia of reliability sufficient to satisfy constitutional demands is the one the Constitution actually prescribes: confrontation." *Id.* at 68-69. Where out-of-court testimonial "evidence is at issue the Sixth Amendment demands unavailability and a prior opportunity for cross-examination" before it may be introduced. *Id.* at 68-69. The conditions are "necessary" and "dispositive" in determining admissibility of "testimonial statements." *Id.* at 55-56. As neither condition is satisfied, the foundational documents cannot, alone, be admitted.

As the Alcohol Influence Report is admissible without the operator's testimony, the machine will never be confronted.

The New Jersey Supreme Court acknowledged that the ability to cross-examine the operator of the Alcotest will provide little means to challenge the veracity of the Alcohol Influence Report. *See* Appendix A, 126a. The Court stated that because it gave the opportunity to cross-examine the witnesses most familiar with the machine, and because the Court caused Draeger to divulge its source code, confrontation rights have been satisfied for all pending and future cases.

This is especially problematic, as the Court allowed for an outrageous shortcoming in the machine, an algorithm that corrects for drifting of one of the measuring devices on the machine, the fuel cell. Drifting is aging of the fuel cell, which reacts more slowly and with less intensity to the same amount of alcohol than

when the fuel cell is new. As a result, Draeger added a compensating algorithm into the software that attempts to compensate for the lack of complete data arising from the fuel cell measurement. In the event that fuel cell drift is detected during the control test, the algorithm mathematically increases the EC reading that is reported by up to twenty-five percent of the difference between the IR and EC readings from the tests of the subsequent breath samples. *See* Appendix A, 88-89a. Even with this manufacturing of a reported breath test result from the machine, the Court alarmingly stated, "We are confident, based on this far-reaching and searching inquiry, that the device is sufficiently reliable so that the rights of all defendants have been protected." *See* Appendix A, 126a.

The New Jersey Supreme Court paradoxically states, "We perceive both in the Constitution itself and in *Crawford*, ample room for admissibility of these foundational documents consistent with protecting defendants' rights." *See* Appendix A, 119-20a. Without the ability to confront the humans, whose written statements attest to how they have set up the machine, the breath test reading printed out by the machine will be accepted with no ability to challenge the process undertaken to achieve the result, i.e. true trial by machine.

II. THIS PETITION SHOULD BE GRANTED BECAUSE THE DECISION FROM NEW JERSEY'S HIGHEST COURT IS FINAL AS TO THE NAMED DEFENDANTS AND THOUSANDS OF AFFECTED PARTIES WHOSE CASES REMAIN PENDING TRIAL

While the Petitioner's individual cases have not yet been finalized based on their remand to the lower courts, the holding of the New Jersey Supreme Court is final as to the issues raised in this Petition. The Order that accompanies the Opinion states:

> the previously imposed stay is vacated and prosecutions, appeals, and imposition of sentences in all matters arising pursuant to N.J.S.A. 39:4-50, shall proceed in accordance with the following directives:
>
> A. For all pending prosecutions, including all prosecutions in which imposition of sentence has been stayed by our January 10, 2006 Order, and in all future prosecutions based on tests conducted prior to the implementation of our directives through creation of and implementation of revised firmware, Alcotest 7110 MKIII-C with New Jersey Firmware version 3.11 is sufficiently scientifically reliable, and the Alcohol Influence Report (AIR) which sets forth the results of breath tests is admissible as evidence of blood alcohol content (BAC) . . .

Thus, the New Jersey Supreme Court has undermined the protection of the United States Constitution, not only to the Petitioners herein, but to thousands of pending cases in New Jersey and countless future cases. Whether Petitioners' individual matters are not finalized should be of no moment to the consideration of the Constitutional violations set forth by the New Jersey Supreme Court's ruling inasmuch as the decision on the confrontation question is not only repugnant to the Constitution but also final in application.

CONCLUSION

For all the foregoing reasons, petitioners respectfully request that the Supreme Court grant review of this matter.

Respectfully submitted,

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